

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

No 76-1518

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 76-1518

UNITED STATES OF AMERICA,
Plaintiff-Appellant

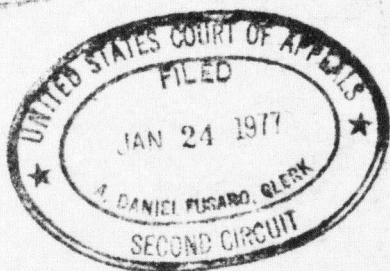
v.

WILLIAM D. TURNER,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLEE



ROBERT G. OLIVER
ATTORNEY FOR DEFENDANT-APPELLEE
205 Church Street
New Haven, Connecticut

TABLE OF CONTENTS

Authorities Cited.....	iii
Preliminary Statement.....	1
Statement of Issues.....	2
Statement of the Case.....	3
Statement of Facts.....	4
Argument	
I. THE SEARCH AND SEIZURE IN QUESTION WAS A JOINT FEDERAL-STATE SEARCH AND, JUDGED BY THE REQUIREMENTS OF RULE 41, FEDERAL RULES OF CRIMINAL PROCEDURE, WAS INVALID.....	11
A. FEDERAL PARTICIPATION IN THE INVESTIGATION, SURVEILLANCE, AND APPLICATION FOR AND ISSUANCE OF THE WARRANT AND IN THE ACTUAL SEARCH MADE THIS A JOINT FEDERAL-STATE SEARCH AS A MATTER OF LAW.....	11
B. NEITHER THE PLAIN LANGUAGE NOR THE POLICY AND SPIRIT OF RULE 41(c) WERE SATISFIED: THE AFFIDAVITS WERE NOT SWORN TO BEFORE THE JUDGE NOR DID THE APPLICANTS APPEAR PERSONALLY.....	14
C. THE WARRANT WAS NOT ISSUED AND SIGNED BY A STATE JUDGE AS REQUIRED BY RULE 41, SUBDIVISIONS (a) AND (c).....	25
II. THE DEFECTS IN THE CALIFORNIA PROCEDURE IN THIS CASE WERE OF CONSTITUTIONAL MAGNITUDE.....	34
A. CONSTITUTIONALLY, THE PROCEDURE USED IN THIS CASE WAS DEFICIENT BECAUSE ONLY A DISINTERESTED MAGISTRATE WITHIN THE SPHERE OF THE JUDICIAL SYSTEM CAN ISSUE OR SIGN THE SEARCH WARRANT.....	34
B. A TELEPHONIC OATH IS IMPERMISSIBLE UNDER THE FOURTH AMENDMENT.....	37

III. THE DISTRICT COURT CORRECTLY DECIDED THAT CALIFORNIA LAW WAS VIOLATED BY THE SEARCH IN THIS CASE.....	42
IV. THE SUPPRESSION REMEDY APPLIED BY THE DIS- TRICT COURT WAS PROPER UNDER THE CIRCUMSTANCES....	57
Conclusion.....	58
Addendum: Statutes and Rules.....	59
Certificate of Service.....	63

AUTHORITIES CITED

Cases Cited

<u>Albrecht v. United States</u> , 273 U.S. 1,5 (1926) (Brandeis, J.).....	18
<u>Bayer v. Arizona</u> , 455 F.2d 804 (9th Cir. 1972).....	40
<u>Bowyer v. Superior Court</u> , 37 Cal. App. 3d 151, 111 Cal. Rptr. 628, 635 rehearing 112 Cal. Rptr. 266 (1974).....	42,48
<u>Bookman v. City of New York</u> , 200 N.Y. 53, 56, 93 N.E. 190, 191 (1910).....	38
<u>Broadcast Music v. Havana Madrid Restaurant Corp.</u> , 175 F.2d, 77, 80 (2d Cir. 1949).....	21
<u>Burtch v. Zeuch</u> , 200 Iowa 49, 202 N.W. 542, 544, 39 A.L.R. 1349 (1925).....	41
<u>Byars v. United States</u> , 273 U.S. 28, 33 (1927)	11,12,33
<u>Clay v. United States</u> , 246 F.2d 298, 303 (5th Cir.) (cert. denied 355 U.S. 863 (1957)).....	15
<u>Cody v. Dombrowski</u> , 413 U.S. 433 (1973).....	55
<u>Commonwealth v. Millikan</u> , 300 A.2d 78,81 (P.A. 1973).	40
<u>Compton v. Alabama</u> , 214 U.S. 1 (1909).....	17
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443,449-453 (1971).....	27,28,30, 34,35,36, 50,51
<u>Davis v. United States</u> , 35 F.2d 957 (5th Cir. 1929)..<	18
<u>Divine v. Commonwealth</u> , 236 Ky. 579,580	28
<u>Dow v. Baird</u> , 389 F.2d 882,884 (10 Cir. 1968).....	39
<u>Dubbs v. Lehman</u> , 100 Fla. 799,130 So. 36,38 (1930)...	26

<u>Dudley v. United States</u> , 320 F.Supp. 456,459 (N.D.Ga. 1970).....	15
<u>Dyer v. MacDougall</u> , 201 F.2d 265,268-269 (2d Cir. 1952).....	21
<u>Elkins v. United States</u> , 364 U.S. 205,224 (1960).....	13,49
<u>Ex parte Burford</u> , 3 Cranch 448,451 (1806) (Marshall, Ch.J.).....	18
<u>Ex parte Rubens</u> , 73 Ariz. 101,238 P.2d 402 (1951)....	17
<u>Ex parte Davis</u> , 333 Mo. 262,62 S.W. 2d 1086, 89 A.L.R. 589 (1933).....	17
<u>Fixler v. Superior Court</u> , 113 Cal. Rptr. 285, 289-290 (Ct.App. 1974).....	40
<u>Frazier v. Roberts</u> , 441 F.2d 1224,1227-1228 (8th Cir. 1971).....	15,18,19
<u>Giordenello v. United States</u> , 357 U.S. 480,486 (1958)	34
<u>Gramaglia v. Gray</u> , 395 F.Supp. 606,610 (S.D.Ohio 1975).....	39
<u>Huff v. Commonwealth</u> , 194 S.E. 2d 690,692 (Va. 1973).....	40
<u>In re Keller</u> , 36 Fed. 681,684 (D.Minn. 1888).....	16
<u>In re Murphy</u> , 321 Mass. 206,72 N.E. 2d 413,418 (1947).....	16
<u>In re Neagle</u> , 39 Fed. 883 (Cir. Ct. N.D. Cal.) Affd. 135 U.S. 1 (1890).....	44
<u>In re Rule of Court</u> , 3 Woods 502, Fed. Cas. No. 12,126 (Cir. Ct., N.D.Ga. 1877).....	18
<u>Johnson v. United States</u> , 333 U.S. 10,14 (1948).....	34,36
<u>Kentucky v. Dennison</u> , 24 How. 66,105 (1860).....	16
<u>Kuhn v. St. Joseph</u> , 234 S.W. 353 (Ct. App. 1921).....	41

<u>Lustig v. United States</u> , 338 U.S. 74,78 (1949)	11,12,33
<u>Lee v. Federal Maritime Board</u> , 284 F.2d 577,580-581 (9th Cir. 1960).....	27
<u>McKnight v. State Land Board</u> , 14 Utah 2d 238, 381 P.2d 726,733-734 (1963).....	41
<u>Miller v. Sigler</u> , 353 F.2d 424,426(8th Cir. 1965)...	41
<u>Nathanson v. United States</u> , 290 U.S. 41,46,47 (1933)	15
<u>Navarro v. United States</u> , 400 F.2d 315,317-318 (5th Cir. 1968).....	12,29,30,33,53
<u>Neggo v. United States</u> , 390 F.2d 609 (9th Cir. 1968)	46
<u>Nixon v. United States</u> , 36 F.2d 316,317 (9th Cir. 1929).....	18
<u>Omichurd v. Barker, Willes</u> , 538, 1 Smith's Lead Cas. (6th Am. ed. 1866) 672,679-680 (Ct. of Chancery 1744).....	18
<u>People v. Aguirre</u> , 103 Cal. Rptr. 153,155 (App. Ct. 1972)	40.42
<u>People v. Brisendine</u> , 119 Cal. Rptr. 315,531 P.2d 1099,1110-1115 (Sup. Ct. 1975).....	49
<u>People ex-rel. Kupala v. Woods</u> , 52 Ill. 2d 48,284 N.E. 2d 286 (1972).....	17
<u>People v. Grant</u> , 1 Cal. App. 3d 563, 81 Cal. Rptr. 812,815-816 (1970).....	47
<u>People v. Lacey</u> , 105 Cal. Rptr. 72,76 (Cal. App. 1973).....	44,46
<u>People v. Martin</u> , 225 Cal. App. 2d 91,36 Cal. Rptr. 924,926 (1964).....	46
<u>People v. Peck</u> , 113 Cal. Rptr. 806,810 (Ct. App. 1974).....	40 , 42
<u>People v. Semonite</u> , 189 N.Y.S. 2d 256,257-258 (County Ct. 1959).....	38
<u>People v. Yet Ming Yee</u> , 145 C.A. 2d 513,382 P. 2d 616 (1956).....	44

<u>Perry v. Johnson</u> , 37 Conn. 32,35 (1870).....	28
<u>Rea v. United States</u> , 350 U.S. 214,216-218 (1955)...	12
<u>Roberts v. Reilly</u> , 116 U.S. 80,94 (1885).....	16
<u>Rose v. United States</u> , 45 F.2d 459,464 (8 Cir. 1930)	15,18,21
<u>Salata v. United States</u> , 286 Fed. 125 (6th Cir. 1923)	25
<u>Sgro v. United States</u> , 287 U.S. 206,210 (1932).....	20
<u>Shadwick v. City of Tampa</u> , 407 U.S. 345,348- 350 (1972).....	22,27,28, 34,35,36, 50,51
<u>State v. Almari</u> , 3 Conn. Cir. Ct. 641,643, 222 A.2d 820,822 (1966).....	29
<u>State v. Boniface</u> , 26 Ariz. App. 118, 546 P.2d 843,846 (1976).....	40
<u>State v. Dow</u> , 227 Iowa 1215,290 N.W. 518, 522 (1940).....	41
<u>State v. Fleming</u> , 240 Mo. App. 1208, 1213.....	28
<u>State v. Murmane</u> , 172 Minn. 401, 215 N.W. 863 (1927)	17
<u>Sternberg v. Superior Court</u> , 41 Cal. App. 3d 281, 115 Cal. Rptr. 893 (1974).....	47,48,49
<u>United States v. Averell</u> , 296 F.Supp. 1004 (E.D. N.Y. 1969).....	55
<u>United States v. Berkus</u> , 428 F.2d 1148 (8th Cir. 1970).....	40
<u>United States v. Burke</u> , 517 F.2d 377,384, (2d Cir. 1975).....	12,13,14, 21,30,33, 52,53,54
<u>United States v. Christopher</u> , F.2d Docket No. 76-1334 (2d Cir. Dec. 7, 1976).....	56

<u>United States v. Coppola</u> , 281 F.2d 340,345 (2d Cir. 1960).....	12
<u>United States v. Dudek</u> , 530 F.2d 684 (6th Cir. 1976).....	55
<u>United States v. Elliott</u> , 210 F.Supp. 357,360 (D.Mass. 1962).....	29
<u>United States v. Hall</u> , 505 F.2d 961 (3d Cir. 1974)..	55
<u>United States v. Harrington</u> , 504 F.2d 130 (7th Cir. 1974).....	55
<u>United States v. Longfellow</u> , 406 F.2d 415 (4th Cir. 1969), cert. den. 394 U.S. 998.....	55
<u>United States v. McKenzie</u> , 446 F.2d 949,953 (6th Cir. 1971).....	37
<u>United States v. Mitchell</u> , 274 F.128,131 (N.D.Calif. 1921).....	22
<u>United States v. Passero</u> , 385 F.Supp. 654, 658 (D.Mass. 1974).....	29,30
<u>United States v. Pechac</u> , 54 F.R.S. 187 (D.Ariz. 1972)	29,30
<u>United States v. Romano</u> , 203 F.Supp. 27 (D.Conn. 1962), revd. in part, affd. in part, 330 F.2d 566 (2d Cir. 1974), cert. den. 380 U.S. 942 (1965).....	55
<u>United States v. Schack</u> , 165 F.Supp. 371,374 (S.D. N.Y. 1958).....	26
<u>United States v. Sellers</u> , 483 F.2d 37,43-44 (5th Cir. 1973).....	12,14
<u>United States v. Soriano</u> , 482 F.2d 469,478 (5th Cir. 1973).....	21
<u>United States v. Sturgeon</u> , 501 F.2d 1270,1273 (8th Cir. 1974), cert. denied 419 U.S. 1071 (1974).	12
<u>Ward v. United States</u> , 316 F.2d 113,117 (9th Cir. 1963).....	46

<u>Weinberg v. United States</u> , 126 F.2d 1004, 1006 (2d Cir. 1942).....	25
<u>Whiteley v. Warden</u> , 401 U.S. 560, 568 (1971).....	21, 27
<u>Wise v. Cain</u> , 212 S.W. 2d 880, 882 (Tex. Civ. App. 1948).....	38

Statutes Cited

Arizona Laws 1970, Ch. 59 §§2, 3.....	19
Arizona Laws 1971, Ch. 152 §§3, 4.....	19
Arizona Rev. Stat. §§13-1444, 13-1445.....	19
California Health & Safety Code § 1707.1.....	4, 61
California Penal Code § 7(8).....	43
California Penal Code § 487(1).....	4
California Penal Code § 613-616.....	18
California Penal Code § 620.....	18
California Penal Code § 816.....	46
California Penal Code § 830.....	43
California Penal Code § 832.....	47
California Penal Code § 836.....	45
California Penal Code § 837, 847.....	45
California Penal Code § 1523.....	46, 59
California Penal Code § 1524.....	5, 6
California Penal Code § 1526(b).....	5, 10, 31, 42, 44, 47, 49, 60

California Penal Code § 1528(b)	5,10,31, 42,43,44, 45,47,49, 60,61
California Penal Code Chap. 4.5	44
California Stats. 1971 c.1504,p.2975, § 2	47
Constitution of the United States, Fourth Amendment.	32,34,37, 39,54,62
P.L. 94-349, 90 Stat. 822 (94th Cong. 2d. Sess., July 8, 1976)	23
1 Stat. 302	16
5 U.S.C. § 1006(b)	27
18 U.S.C. § 203(a)	16
18 U.S.C. § 542	3
18 U.S.C. § 613-616	18
18 U.S.C. § 620	18
18 U.S.C. § 3182	16
18 U.S.C. § 3731	3
 <u>Federal Rules of Criminal Procedure Cited</u>	
Amend. to F.R. Crim. P. 41(c)(2)(A)	23
F.R. Crim. P. Rule 41	8,12,14, 15,16,18, 19,21,22, 24,25,26, 28,29,30, 31,32,39, 40,52,53, 54,56
F.R. Crim. P. Rule 4a	26

Other Authorities Cited

12 A.L.R. 538.....	38
58 A.L.R. 604.....	38
58 A.M.J. <u>Oaths</u> § 12, pp. 850-851.....	38
Beechan, "Oral Search Warrants," 21 U.C.L.A. Law R. 691, 701-703 (1973).....	21
Boland & Sayer, Oaths and Affirmations (2d Ed. 1961), p.1.....	18
2A C.J.S. <u>Affidavits</u> § 2 (1972).....	16
17 Cal. Jur. 3d, "Criminal Law," §340 (1975 ed.)....	47
Ford on Oaths (8th Ed. 1903), p. 1.....	17
Model Code of Pre-A. Procedure § 172.....	38
Senate Report No. 94-990 (June 25, 1976) Committee on the Judiciary, re HR 13899.....	23
1 Stephen, History of the Criminal Law of England (1883) pp. 68-70.....	17
L.Tiffany, D. McIntyre & D.Rotenberg, Detection of Crime, 118 (1967).....	19
Webster's Third New International Dictionary at 197 (1969).....	16
4 Wharton, Criminal Law & Procedure, § 1551.....	29

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1518

* - * - * - * - *

UNITED STATES OF AMERICA,

Appellant,

V.

WILLIAM TURNER,

Appellee.

* - * - * - * - *

BRIEF FOR THE APPELLEE

* * * * *

Preliminary Statement

The United States, plaintiff-appellant, has appealed from the order granting defendant's motion to suppress evidence. The order was entered by Judge Robert C. Zampano, United States District Judge, District of Connecticut. His opinion is unreported.

STATEMENT OF ISSUES

I. Did this joint federal-state search violate Rule 41, F.R. Crim. P., because the affiants were not sworn to before the state judge and did not appear personally?

II. Was Rule 41 violated because the warrant was signed by a federal law enforcement officer?

III. Was the Fourth Amendment violated because a federal law enforcement officer outside the sphere of this California judicial branch participated in the issuance of the state search warrant?

IV. Is an oath administered over the telephone permissible under the Fourth Amendment?

V. Does the California telephonic search warrant statute on its face, or as employed in this case, violate the Fourth Amendment?

VI. Was the federal exclusionary rule properly applied in this case?

STATEMENT OF THE CASE

On December 12, 1974, a federal Grand Jury sitting at New Haven, Connecticut, returned a true bill of indictment (N-74-124) charging the defendants William Turner and Eli Pinoci with violations of 18 U.S.C. Sections 371 and 542. The indictment charged Turner with three counts of making false declarations to United States Customs concerning the entry into the United States of quantities of amygdalin purissimum, and charged Pinoci and Turner with conspiring with each other to make these false statements to United States Customs.

On May 27, 1975, Turner entered pleas of not guilty to each count of the indictment. Pinoci, a German national, resides in West Germany and has never been apprehended.

On July 11, 1975, Turner moved to suppress all evidence that had been discovered during a search of Turner's residence in California on June 11, 1974.

On October 5, 1976, Turner's motion to suppress was granted (Zampano, J.). Judge Zampano's decision granting the motion to suppress is as yet unreported.

On October 28, 1976, pursuant to 18 U.S.C. Section 3731, the United States filed a Notice of Appeal along with a certification that the appeal was not being taken for purposes of delay and that the evidence suppressed is a substantial proof of facts material to the proceedings.

STATEMENT OF FACTS

On June 11, 1974, as a result of a combined investigation of Turner by agents of the Food and Drug Section, California Health Department, and special agents of the United States Customs Agency Service, an application was made for the issuance of a search warrant for Turner's residence at 53 East Shasta Street, Chula Vista, California. (App. 7A) This application was made after Turner and one Winifred Davis had been arrested by California state authorities for violation of California Health and Safety Code, §1707.1.¹

The investigation of Turner centered about his involvement in the distribution of amygdalin, sometimes also referred to as laetrile or vitamin B-17, a substance claimed by some to alleviate or cure cancer. The distribution of amygdalin for treatment of cancer is prohibited by California Health and Safety Code, §1707.1. The substance is legally manufactured and distributed abroad, particularly in West Germany and Mexico, but manufacture, distribution and importation for medical use in this country has not been approved by the Federal Food and Drug

¹ Although Turner was charged, when arrested, with violation of the Health Safety Code §1707.1 and with larceny of property of \$200 in value in violation of Penal Code §487(1), the latter charge was not brought to the magistrate's attention during the search warrant application and was eventually dropped by the State (conspiracy to violate §1707.1 being substituted therefor.)

Administration. The investigation involved not only agents of the California Health Department, but also local police officers, members of the San Diego County Sheriff's office, special agents of the United States Customs Agency Service and at least one United States Postal Service investigator. The California investigation was the outgrowth of a nationwide federal investigation into the use and distribution of amygdalin.

At approximately 9:00 P.M. on June 11, 1974, Judge Kenneth Johns of the San Diego Municipal Court was telephoned at home and requested to issue a search warrant under the provisions of California Penal Code §1524.² (App. 25A) A conference telephone call was set up, with Sharon Dalton, a special operator of the California Health Department, special agent Seth Nadel, United States Customs Agency Service, and Deputy District Attorney Charles Bell, San Diego County District Attorney's office, present at the Chula Vista Police Department. Judge Johns was at his own home. (App. 14A) The telephone call was recorded and a transcript of the conversation is annexed to the warrant (App. 14A-29A) The judge purported to administer an oath over the telephone to special agent Nadel and Miss Dalton. (App. 14A)

² Penal Code §1524 sets forth four separate grounds for issuance of a search warrant. The particular ground or grounds relied on by the applicants were never called to the judge's attention nor did the judge specifically declare which ground was applicable. The statutory procedure for telephonic search warrants is set forth in Penal Code §§1526(b) and 1528(b).

Judge Johns did not know whether either person actually observed any of the usual formalities of oath taking.

The prosecutor largely conducted the proceedings, asking questions over the telephone of Nadel and Dalton in turn. After Miss Dalton discussed conversations she had with Turner and Davis (App. 15A-21A), the Federal agent testified. Nadel stated that he had been surveilling the premises located at 53 East Shasta today (App. 22A), had observed persons subsequently identified as Turner and Davis in the vicinity of 53 East Shasta Street, and had been in constant radio communication with "other customs agents" as part of the surveillance. (App. 23A). Nadel concluded that based upon the information that he and Dalton had given, he believed "that grounds exist within Penal Code §1524 of the California Penal Code to order a search warrant." (App. 25A) Nadel requested that a warrant be issued and that the judge permit the warrant to be served after 10:00 P.M. (App. 26A)

According to the transcript of the telephone conversation, Nadel had in front of him a California telephonic search warrant form, "MIS-111" (App. 27A) He told the judge he had inserted in the form warrant the description of the premises sought to be searched as well as the description of the property to be searched for. (App. 28A) Judge Johns did not have a copy of this warrant in front of him at the time. It does not appear in the record whether he even had a blank form of such warrant with

him during the telephone conversations. Judge Johns told the Federal agent to fill in the blanks in the search warrant form, to sign the judge's name on the search warrant as "magistrate" and to add his own name, department and badge number which Nadel did. (App. 8A, 27A) The discussion between the judge, Nadel and the deputy District Attorney contemplated the service of the warrant by a Chula Vista police officer. (App. 26A)

Judge Johns did not actually see the warrant and personally sign it until a day or so later--until the search had actually been made. What customs agent Nadel had in front of him during the telephone conversation was at least the first two pages of the California telephonic search warrant form, MIS-111, which comprised the so-called "Search Warrant". (App. 8A) Customs agent Nadel signed Judge Johns' name on the lower right hand portion of the form titled "Search Warrant" (App. 8A). The signature of Judge Johns appears on the lower left hand corner of that form as well as on the form entitled "Telephonic Search Warrant (Original)" (App. 7A) with the notation that the warrant was issued at 9:30 P.M. on June 11, 1974. The latter two signatures with the dates and times were inserted not on June 11, however, but by the judge a day or two later after the search had been made.

Thomas W. Schaefer, Chula Vista Police Department, was the

officer by whom the warrant was formally executed, according to the Return. (App. 9A) Numerous state and federal law enforcement personnel, including Nadel and Schaefer, made a thorough and extensive search of the entire premises described in the warrant beginning about 10:15 P.M. (App. 8A), seizing at least 79 separate groups of items, including numerous boxes, papers, bottles and jars, paraphernalia, files, cartons and documents of all sorts and descriptions. (App. 9A-13A) The Return was sworn to by Chula Vista police officer Schaefer before Judge Johns on June 14, 1974. (App. 9A-13A)

The tape recording of the telephone conversation was transcribed by one Maria Molnar on June 12, 1974. (App. 29A) On June 19, 1974, Judge Johns certified that he filed the original tape recording, the transcript and the original search warrant in court (App. 30A) and, in fact, filed these items in the San Diego Municipal Court on that date. (App. 31A)

The defendant was indicted by a federal Grand Jury at New Haven, Connecticut, on December 17, 1974, as a result of certain documentary evidence which was found among the items seized on the East Shasta Street premises during the June 11, 1974, search.

Subsequent to the indictment in this case, Turner filed, pursuant to Rule 41, F.R.Crim. P., a motion to suppress all property that had been seized on June 11, 1974, from the premises

at 53 East Shasta Street, Chula Vista. California. (App. 2A)
The motion set forth ten separate grounds. After the motion was filed, it was stipulated between the defendant and the government that three threshold legal issues would be briefed and argued by the parties prior to the consideration of the remaining seven grounds set forth in the motion to suppress. The parties reserved their rights to litigate the remaining grounds (most of which would require an evidentiary hearing) as well as certain other pending preliminary motions. The Court entered its order approving this scheduling Stipulation. (App. 2A)

The three grounds of the motion to suppress presented to the District Court were as follows:

1. The warrant was not issued supported by oath or affirmation.
2. The warrant was issued under authority of the California state statute providing for telephonic search warrant, which statute violates the United States Constitution.
3. The warrant was not signed by a disinterested magistrate prior to its issuance or execution.

The decision of the District Court below, Zampano, J., was based upon the grounds set forth in the Memorandum of Decision (App. 32A-36A)--that the warrant in question was not signed in accordance with the requirements of the California statute, and that this defect required suppression in this federal prosecution of all evidence seized pursuant to the warrant. On this

appeal, Turner contends that the ultimate order of the District Court to suppress the evidence was correct, not only on the grounds recited in the Memorandum of Decision, but also on the alternative grounds which were before the court below on the Motion to Suppress.

• This case presents questions of first impression in the federal courts. Neither the California Supreme Court nor any federal court has, to Turner's knowledge, passed upon the validity of the California telephonic search warrant statutes (Penal Code §§1526(b), 1528(b)). Nor has there been any reported decision in any jurisdiction which has ruled upon the legality of proceedings similar to the unique proceedings which actually occurred in this case.

ARGUMENT

I. - THE SEARCH AND SEIZURE IN QUESTION WAS A JOINT FEDERAL-STATE SEARCH AND, JUDGED BY THE REQUIREMENTS OF RULE 41, FEDERAL RULES OF CRIMINAL PROCEDURE, WAS INVALID.

A. - FEDERAL PARTICIPATION IN THE INVESTIGATION, SURVEILLANCE, AND APPLICATION FOR AND ISSUANCE OF THE WARRANT AND IN THE ACTUAL SEARCH MADE THIS A JOINT FEDERAL-STATE SEARCH AS A MATTER OF LAW.

It is established that "a search is a search by a federal official if he had a hand in it. . ." Lustig v. United States, 338 U.S. 74, 78 (1949). The participation by a federal agent in aid of a State search renders that search in substance and effect "a joint operation of the local and federal officers." Byars v. United States, 273 U.S. 28, 33 (1927).

In this case, prior to June 11, 1974, there had been a pattern of cooperation and joint activity by federal customs officers and state and local law enforcement officials, all directed against William D. Turner. On June 11, customs agent Nadel undertook surveillance of the premises to be searched in cooperation with other customs agents. Nadel was the applicant for the warrant, Nadel's testimony directed the magistrate's attention to the premises to be searched, and Nadel even signed the judge's name to the warrant. Nadel, in company with several other U. S. Customs agents, joined with state officials in the search and seizure. In all, at least six customs agents and one U. S. Postal Service investigator participated with approximately seven state and local law enforcement officials in the inves-

tigation, application for and execution of the search warrant.

Reversing its position below, the Government in its Appeal Brief (pp. 14-15) now concedes, as it must, that this search and seizure was a joint federal-state search as a matter of law. Byars v. United States, *supra*; Lustig v. United States, *supra*; Navarro v. United States, 400 F.2d 315, 317-318 (5th Cir. 1968); United States v. Hanson, 469 F.2d 1375, 1376 (5th Cir. 1973). See United States v. Coppola, 281 F.2d 340, 345 (2d Cir. 1960).

Such a search, in addition to complying with federal constitutional requirements, must comply with any provisions of F.R.Crim.P. 41 which are designed to protect the integrity of the federal courts or govern the conduct of federal officers. United States v. Sellers, 483 F.2d 37, 43-44 (5th Cir. 1973); United States v. Sturgeon, 501 F.2d 1270, 1273 (8th Cir. 1974), *cert. denied* 419 U.S. 1071 (1974). See United States v. Burke, 517 F.2d 377, 384 (2d Cir. 1975); Rea v. United States, 350 U.S. 214, 216-218 (1955).

The Government in its Brief (pp. 13-14) devotes considerable effort to arguing that the California courts would not suppress the Turner evidence. That is not the question on this appeal. What a California court would or would not do if faced with the facts here is not the measure of this court's responsibility. "In determining whether there has been an unreasonable

search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out."³ Elkins v. United States, 364 U.S. 206, 224 (1960).

It is Turner's position on this appeal that the violations of Rule 41 were of constitutional magnitude or, at least, were such as to make "what was done in effect an unconstitutional warrantless search" under the formulation suggested by this court in United States v. Burke, supra, 517 F.2d at 386.

³ For reasons unknown to counsel in this case, in the California prosecution of Turner which followed the June 11, 1974, arrest, California attorneys never raised, and the state courts never considered, the three grounds of challenge to the State warrant which were made before Judge Zampano.

B. NEITHER THE PLAIN LANGUAGE NOR THE POLICY AND SPIRIT OF RULE 41(c) WERE SATISFIED: THE AFFIDAVITS WERE NOT SWORN TO BEFORE THE JUDGE NOR DID THE APPLICANTS APPEAR PERSONALLY.

Rule 41 provides in pertinent part:

"(c) A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit." [emphasis supplied]

Two defects in the procedure mandated by Rule 41 are claimed by Turner on this appeal: first, that the warrant was not issued on an affidavit sworn to before the magistrate; and second, that the disinterested magistrate did not, as a matter of law, issue the warrant. These defects are so fundamental that this court need not decide whether any particular requirement of Rule 41 is "a sine qua non to federal court use of the fruits" of the search, the test used by the 5th Circuit in United States v. Sellers, 483 F.2d 37, 43 (1973). These violations will be shown to be of constitutional magnitude and sufficient consequence to justify use of the exclusionary rule under the Burke test.

1. The requirement that a warrant issue "only on an affidavit or affidavits sworn to before the . . . state judge. . ." is fundamental to the integrity of the Federal courts and to governing the conduct of federal officers. The requirement largely parallels the constitutional requirement of the Fourth Amendment: ". . .no warrants shall issue, but upon probable cause, supported by oath or affirmation. . ." Cf. Nathanson v. United States, 290 U.S. 41, 46, 47 (1933); Frazier v. Roberts, 441 F.2d 1224, 1227-1228 (8th Cir. 1971). It guarantees that government intrusion into a citizen's privacy will only be authorized based upon sworn submissions.

No federal authority can be found permitting a magistrate to act under Rule 41 except where the affidavit is sworn to before him. Cf. Clay v. United States, 246 F.2d 298, 303 (5th Cir.), cert. denied 355 U.S. 863 (1957); Dudley v. United States, 320 F. Supp. 456, 459 (N.D.Ga. 1970); Rose v. United States, 45 F.2d 459, 464 (8th Cir. 1930). In fact, it is the practice of federal magistrates to require affiants to execute the affidavits in their presence. In this case, in contrast, the affiants were not in the presence of Judge Johns but were miles away, connected only by telephone.

The lack of compliance with Rule 41(c) is obvious. "An affidavit is a written statement under oath taken before an auth-

orized officer." 2A C.J.S. Affidavits §2 (1972). As used in Rule 41, the most natural meaning of "before" is "in the presence of" (Webster's Third New International Dictionary, at 197 (1969)) rather than the strained meaning urged by the Government in its Brief (pp. 20-21). The statute cited by the Government, 18 U.S.C. §203(a), refers to matters pending "before" a governmental agency or department.

Strong support for the proposition tht "before" means "in the presence of" exists in the overwhelming weight of authority construing the same word in another, but similar, context. Since 1793 the federal extradition statutes have provided that the demanding state must produce to the host state "a copy of an indictment found or an affidavit made before a magistrate of any state or territory. . . charging the person so demanded with having committed treason, felony or other crime. . ." 18 U.S.C. §3182, (formerly 18 U.S.C. §662 (1940 ed.) (R.S. §5278)). The pertinent language "an affidavit made before a magistrate" has been in the law since Congress enacted the extradition procedure in 1793. 1 Stat. 302; Kentucky v. Dennison, 24 How. 66, 105 (1860); Roberts v. Reilly, 116 U.S. 80, 94 (1885). The courts have repeatedly held that "before" in this statute means "in the presence of." See e.g., In re Keller, 36 Fed. 681, 684 (D.Minn. 1888); In re Murphy, 321 Mass. 206, 72 N.E. 2d 413, 418 (1947);

Ex parte Davis, 333 Mo. 262, 62 S.W. 2d 1086, 89 A.L.R. 589 (1933); State v. Murname, 172 Minn. 401, 215 N.W. 863 (1927); People ex rel. Kubala v. Woods, 52 Ill. 2d 48, 284 N.E. 2d 286 (1972); Ex parte Rubens, 73 Ariz. 101, 238 P.2d 402 (1951). See also Compton v. Alabama, 214 U.S.1 (1909).

2. The Government contends in its Brief (pp. 19-20) that it seems not to have occurred to the framers of Rule 41(c) that a state would authorize oaths to be given to a judge but outside his physical presence. The history of the Rule since its adoption casts doubt upon that contention.

Since the earliest days of the common law, oaths were required to be sworn before the authorized officer--meaning in the physical presence of such officer. See 1 Stephen, History of the Criminal Law of England (1883), pp. 68-70. The taking of an oath required an outward manifestation by the witness affirming before those having authority to administer the same, for the discovery and advancement of truth and right calling upon the God in which the witness believed to witness that the testimony was true. See Ford on Oaths (8th ed. 1903), p. 1. In its origins the witness, when he took the oath, touched with his hand some part of the Bible. However, it was early held that the witness had only to be sworn according to the peculiar ceremonies of his

own religion or in such manner as he might declare binding on his conscience. See Boland & Sayer, Oaths and Affirmations (2d ed. 1961), p. 1; Omichund v. Barker, Willes, 538, 1 Smith's Lead Cas. (6th Am. ed. 1866) 672, 679-680 (Ct. of Chancery 1744).

When Rule 41(c) was first adopted in 1940, federal law was clear; a search warrant could not be issued by the United States Commissioner on the basis of statements or affidavits of persons who failed to appear and be sworn before the Commissioner. In re Rule of Court, 3 Woods 502, Fed. Cas. No. 12,126 (Cir. Ct., N.D. Ga. 1877); Davis v. United States, 35 F.2d 957 (5th Cir. 1929); Nixon v. United States, 36 F.2d 316, 317 (9th Cir. 1929); accord Ex parte Burford, 3 Cranch 448, 451 (1806) (Marshall, Ch.J.) (arrest warrant); Albrecht v. United States, 273 U.S. 1, 5 (1926) (Brandeis, J.) (arrest warrant); cf., Rose v. United States, supra; Frazier v. Roberts, supra, 441 F.2d at 1226 n. 2, 1228. The original Committee Note to Rule 41(c) states that the drafters intended the Rule to be a restatement of existing law, referring to 18 U.S.C. §§613-616, 620. Those sections, read with the then existing case law, do not support the Government's contention on pages 19-20 of its Brief that federal statutes would have permitted a state to use telephonic oaths and examinations, tape-recorded affidavits and oral subscriptions to affidavits as the basis for issuance of a search warrant.

Prior to the enactment of the California statutes in 1970 no state had thought to countenance telephonic affidavits in support of search warrants.⁴

No provision was included in Rule 41(c) to authorize a magistrate to examine an affiant orally apart from the written affidavit until the 1972 amendments. Cf., Frazier v. Roberts, supra. In 1972 the fourth sentence was added to Rule 41(c) to allow oral examination by the magistrate of "the affiant and any witnesses he may produce. . ." The Committee Note well states the reason for that amendment:

"The provision of subdivision (c) that the magistrate may examine the affiant or witnesses under oath is intended to assure him an opportunity to make a careful decision as to whether there is probable cause. It seems desirable to do this as an incident to the issuance of the warrant rather than having the issue raised only later on a motion to suppress the evidence. See L. Tiffany, D. McIntyre, and D. Rotenberg, *Detection of Crime* 118 (1967). If testimony is taken, it must be recorded, transcribed, and made part of the affidavit or affidavits. This is to insure an adequate basis for determining the sufficiency of the evidentiary grounds with the issuance of a search warrant if that question should later arise.

The draftsmen were careful to insist in the new language added to Rule 41(c) that the affiant "appear personally" and no change was made in the first sentence of the rule requiring the

⁴A similar statute was also enacted in 1970 in Arizona: Laws 1970, Ch. 59 §§2,3; Laws 1971, Ch. 152, §§3,4; Ariz. Rev. Stat. §§13-1444, 13-1445.

affidavit or affidavits to be "sworn to before" the magistrate. Obviously, the drafters chose their language carefully--if oral examination was to be permitted, the proceedings had to be in the presence of the judge, transcribed and made part of the written affidavit. Thus, contrary to the Government's position, the rule explicitly covers the situation at bar: oral examination of affiants. And the rule explicitly disapproves what was done: the affiants did not "appear personally" and they were not "sworn to before" the magistrate.

Sound federal policy underlies the requirement that the oath be personally administered in the presence of the magistrate. A governmental search of home or effects is a drastic intrusion upon the citizen's Fourth Amendment rights. Sgro v. United States, 287 U.S. 206, 210 (1932). Before the federal magistrate authorizes the search, he must make an independent determination of probable cause. When he personally administers the oath, the magistrate is assured that the constitutional requirement for an oath is satisfied. The magistrate can satisfy himself that the affiant is who he represented himself to be, and that he is mentally competent to make an affidavit. When necessary, the magistrate can also determine or confirm the purpose for which the affidavit was made, the circumstances under which it was made and how it was obtained and caused to be presented to the magis-

trate. Rose v. United States, supra, 45 F.2d at 464. The demeanor of the affiant will also be reliable evidence for the magistrate to consider, particularly if the written affidavit is supplemented by sworn oral testimony.⁵ Cf., Broadcast Music v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d. Cir. 1949); Dyer v. MacDougall, 201 F.2d 265, 268-269 (2d. Cir. 1952).

In addition, the magistrate can fix responsibility for improper or inadequate applications for warrants.⁶ Finally, certain practical difficulties can arise where complex factual and legal contentions are made over the telephone in support of a warrant application, especially where, as in Turner, the magistrate is at home and there is no showing he had available the pertinent statutory texts and forms. The resulting practical difficulties in following detailed oral recitations of facts and of items sought can be so substantial as to undermine the magis-

⁵ Some commentators suggest, however, that demeanor evidence is not generally relied on or very significant in actual warrant application situations. Beechen, "Oral Search Warrants," 21 U.C.L.A. Law R. 691, 701-703 (1973) and authorities cited at nn. 59-63.

⁶ See in an analogous context the important interests served by the Rule 41 requirement that the executing officer be named in the warrant. United States v. Soriano, 482 F. 2d 469, 478 (5th Cir. 1973), cited with approval in United States v. Burke, supra, 517 F.2d at 385, n.9 Once an arrest warrant is issued, of course, dissemination by radio broadcast or telegraphic communication is permissible and forms a proper basis for action in reliance by the recipient. Whiteley v. Warden, 401 U.S. 560, 568 (1971). ♡

trate's ability to satisfy the "capability" requirement en-
unciated in Shadwick v. City of Tampa, 407 U.S. 345 (1972)⁷

In short, the "sworn to before" language facilitates supervision of this crucial (and non-adversary) function of the criminal justice system.

The only federal case which defendant has found which directly considered the legality of the use of the telephone in aid of the issuance of a search warrant by federal authorities pre-dates Rule 41. In United States v. Mitchell, 274 F. 128, 131 (N.D.Calif. 1921), the court rejected the technique, ruling that a defective warrant could not be amended by a telephone communication from the commissioner who had issued it to the officer who had applied for it after the latter, at the scene of the search, sought guidance as to which of several apartments was to be entered.

3. The Government correctly points out that the United States Supreme Court on April 26, 1976, transmitted to the Congress a proposed amendment to Rule 41(c) which would authorize the United States magistrate to issue a search warrant upon the sworn oral testimony of a person not physically in the magistrate's presence. A statement of the person making the sworn

⁷See Part II - A, infra.

oral testimony would be deemed to be an affidavit for the purposes of the rule. However, the rule does not make it clear whether the applicant for the warrant is sworn by the magistrate over the telephone, as was done in the Turner situation, or whether the affiant is to be sworn by the federal law enforcement officer or the attorney for the Government who, presumably, would also be involved in the telephone communication. Proposed Amendment to F.R. Crim. P. 41(c)(2)(A). In any event, this amendment to the Rule was not in effect on June 11, 1974, and, indeed, may never be. The original effective date of August 1, 1976, has been postponed by the United States Congress until August 1, 1977. P.L. 94-349, 90 Stat. 822 (94th Cong., 2d Sess., July 8, 1976). The Senate Report on the bill delaying the effective date bespeaks the doubt Congress had about the wisdom of the proposed amendment:

While the advisory committee [to the Supreme Court] indicates that the telephone procedure is intended to be used in emergency situations, the first sentence of the amendment would authorize such procedure "when the circumstances make it reasonable to do so." Several members of the committee have expressed reservations concerning the propriety of this rule. The committee has concluded that it needs more time in which to consider the proposed amendment to Rule 41(c)(2). Senate Report No. 94-990 (June 25, 1976), Committee on the Judiciary, re HR 13899.

The crucial point for the Turner case is that, at the very least, the United States Supreme Court recognized there is no

authority whatsoever under existing Rule 41(c) for an oral affidavit outside the physical presence of the magistrate or for the affidavit to be sworn to outside of the physical presence of the magistrate. If the law were otherwise, there would have been no necessity to promulgate the proposed amendments to Rule 41(c).

C. THE WARRANT WAS NOT ISSUED AND SIGNED BY A STATE JUDGE AS REQUIRED BY RULE 41, SUBDIVISIONS (a) AND (c).

1. Subdivision (a) of Rule 41 provides in pertinent part:

A search warrant authorized by this rule may be issued by a...judge of a state court of record within the district wherein the property is located...

The Government's Brief (p.21) tries to paper over the fundamental deficiency in the procedure employed in this case by claiming that Judge Johns issued the warrant and Federal Customs Agent Nadel performed a mere clerical task in affixing the judge's signature to it. The defendant contends that, however the actions of those two men are labeled, the procedure used failed to satisfy the requirements of Rule 41.

When Rule 41 was adopted, there was no authority under federal law for the magistrate (then the United States Commissioner) to delegate the signing and issuance of the search warrant to a third party. To the contrary, the federal courts insisted that the person issuing the warrant be properly authorized to do so. E.g., Weinberg v. United States, 126 F.2d 1004, 1006 (2d Cir. 1942); Salata v. United States, 286 Fed. 125 (6th Cir. 1923)

No proper distinction can be drawn between the issuing and the signing of the warrant under Rule 41(c). The preferable meaning of the word "issue" as used in this context should be the

same as that used in the closely comparable context of an arrest warrant under Rule 41(a), F.R. Crim.P.: "If it appears. . .that there is probable cause. . .a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it." In United States v. Schack, 165 F. Supp. 371, 374 (S.D. N.Y. 1958), the court described the process as follows:

"...a complaint has been instituted...when a Commissioner has examined under oath a person making a charge and upon finding probable cause thereupon reduces the charge to writing and signs a warrant for the apprehension of the person named, as provided for in Rule 4(a)."

The definition provided by the Florida Supreme Court similarly points out the complex interconnection of acts which together constitutes "issuing a warrant":

"The issuance of a warrant consists of the execution of the warrant by the committing magistrate and the placing of the warrant in the hands of a proper executive officer for execution. The word 'issue' in this connection is defined by Webster's New International Dictionary, 'to send out officially; to deliver by authority; to publish or utter; to put into circulation; to emit, as to issue an order, to issue a writ, to issue notes.'

"A magistrate may not issue a writ by merely writing out the same in legal form and executing it and then concealing it, or putting it away amongst his papers, but, for the writ to be issued, it must be executed and placed in motion by delivery to the proper executive officer." Dubbs v. Lehman, 100 Fla. 799, 130 So.36, 38 (1930).

In another closely related context, one federal appeals court has found that "signing" is part of the issuing process with respect to the authority to "issue subpoenas." Lee v. Federal Maritime Board, 284 F.2d 577, 580-581 (9th Cir. 1960). In construing §7(b) of the Administrative Procedure Act, 5 U.S.C. §1006 (b), the Ninth Circuit Court observed that:

"Where a statute draws a distinction between 'sign' and 'issue' effect must be given to such distinction. Where no such distinction is drawn none is intended. Section 7(b) of the Administrative Procedure Act does not draw such a distinction. Only the word 'issue' is used. We conclude that the Board examiner was authorized to sign the subpoena." Supra at 581.

Therefore, since this statute gave the hearing examiner "authority subject to the published rules of the agency and within its powers to . . . issue subpoenas authorized by law," the court refused to distinguish between the authority to issue and the authority to sign, each together being an interconnected part of the whole.

A warrant can be issued only by a judicial officer or a disinterested magistrate. Shadwick v. City of Tampa, 407 U.S. 345, 348-349 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 449-453 (1971); Whitely v. Warden, 401 U.S. 560, 564 (1971). This requirement is to insure that the determination of probable cause is made by a magistrate "neutral and detached and capable of the probable cause

determination required. . ." Shadwick v. City of Tampa, supra at 354. The police officer or prosecutor in charge of the investigation cannot act as the magistrate. Coolidge v. New Hampshire, supra.

Rule 41 explicitly incorporates these constitutional requirements: "If the. . .state judge is satisfied. . .he shall issue a warrant. . ." There is no authority for the delegation by the judge to the police officer of the signing of the warrant--yet this is what happened in this case. It would be anomalous to hold, without unequivocal statutory authorization, that a judicial officer can designate the prosecutor or a police officer as his agent to sign a search warrant where the alleged agent could not himself have issued or signed the same.

2. Even if the government is correct in asserting that what the judge did amounted to issuing the warrant, the requirement that the warrant be signed was not satisfied. It is fundamental, not only under Rule 41, but also as a matter of constitutional imperative, that a search warrant must be signed to be valid. "A lawful signature to a warrant by the person authorized to issue it is essential to its issuance." Perry v. Johnson, 37 Conn. 32, 35; State v. Fleming, 240 Mo. App. 1208, 1213; Divine v.

Commonwealth, 236 Ky. 579, 580; 4 Wharton, Criminal Law and Procedure, §1551." State v. Almori, 3 Conn. Cir. Ct. 641, 643, 222 A.2d 820, 822 (1966). Here the policeman signed before the search and the disinterested magistrate did not actually sign until some time after the search had been made.

This defect can be analogized to those in such cases as United States v. Hanson, 469 F.2d 1375 (5th Cir. 1972); Navarro v. United States, 400 F.2d 315 (5th Cir. 1968); United States v. Passero, 385 F. Supp. 654, 658 (D. Mass. 1974); and United States v. Pechac, 54 F.R.D. 187 (D. Ariz. 1972).⁸ In these cases, the state authority which "issued" or "signed" the warrant was a justice of the peace (Hanson, Pechac) or a judge of a state court not a "court of record" (Navarro), or a court clerk (Passero).

There was no claim in those cases, nor is there in this case, that the "issuer" did not carefully weigh and consider the evidence nor that he did not properly decide that there was probable cause. Rather, those cases threw out the evidence seized under valid state warrants solely because the state authority did not qualify under Rule 41 as a judge of a state court of record.

⁸ See also United States v. Elliott, 210 F.Supp. 357, 360 (D.Mass. 1962).

No consideration was given to whether the proper state magistrate would have acted any differently or whether the defendant had sustained any prejudice in a constitutional sense (or in the sense used by this court in United States v. Burke, supra, 517 F.2d at 386-387).⁹ In this case, the defect--no signature by Judge Johns--is just as much a formality as was the requirement which disqualified the magistrate in Hanson, Navarro, Possero, and Pechac, and should lead to the same result--suppression.

Not only did federal law consider an unsigned warrant as invalid at the time Rule 41 was adopted, but since 1940 no changes have been made in Rule 41 permitting delegation of the signing or issuance. And the defendant is not aware of any federal decisions during the intervening years permitting such delegation. In fact, the submission to Congress by the Supreme Court in 1976

⁹The Passero court commented as follows: "The qualifications of the issuing officer are perhaps the most important of the provisions contained in the rule [41]. This court is constrained to conclude that this is the kind of requirement' ...designed to protect the integrity of the federal courts'...The failure to have such an officer issue the warrant taints the search under federal standards and mandates the suppression of the evidence in the federal prosecution." United States v. Passero, supra, 385 F. Supp. at 658. Compare the per se rule of disqualification enunciated in Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971).

of the proposed amendment to allow the magistrate to "direct the federal law enforcement officer or the attorney for the government who is requesting the warrant to sign the magistrate's name on the warrant" recognizes that such a change in the law is required if anyone other than a judge or magistrate is validly to sign or issue a search warrant.

3. There being no federal authority for such delegation, the question remains whether the California statute, Penal Code §1528(b), constitutes sufficient authorization under Rule 41. As discussed in more detail in this Brief, Part III, infra, and as properly found by Judge Zampano (Opinion 3-5, App. 34A-36A), the prescribed California procedure was itself not complied with. U.S. Customs Agent Nadel was not a "peace officer" under California law.¹⁰ By what authority, therefore, did the warrant issue if there was neither federal or state authority to permit it to have been signed as it was? If Judge Johns issued the warrant, then there was no authority under either state or federal law to

¹⁰See discussion and cases cited at Part III, pp. 43-44, infra.

permit delegation of the affixing of his signature to a U. S. Customs Agent.¹¹ If agent Nadel issued the warrant, then Rule 41 was violated as was the California statute and, indeed, the Fourth Amendment. The Government's contention in its Brief (p. 21) that the Judge issued the warrant and Nadel performed a mere clerical task, therefore, does not solve the dilemma into which the aberrant procedure employed on June 11, 1974, has plunged the Government's case.

Accordingly, this court should conclude that the Turner warrant was not issued and signed by a state judge as required by Rule 41. Thus, as concluded in Part IV, infra, ". . . the defect made what was done in effect an unconstitutional warrantless

¹¹This is not a case where the magistrate was so physically handicapped as to be unable to write and properly directed another to affix his signature or mark for him. Such a procedure would, in any event, not be foreclosed by a decision in the Turner case holding that Judge Johns illegally delegated the signing of the warrant to agent Nadel.

search. . .", under the Burke analysis¹² of Navarro.

¹² Judge Friendly observed that "...if the [Navarro] court was right in holding that Rule 41 applied, the defect made what was done in effect an unconstitutional warrantless search..." Supra, 517 F.2d at 386. He did not need to decide if the 5th Circuit correctly characterized the Navarro search as a joint federal-state search or correctly applied Rule 41. Nor need we be concerned here. Turner presents an even stronger case for the conclusion that the search was joint. Unlike Navarro, the federal agents here were involved in the preliminary investigation and in the stake-out as well as in every stage of the warrant application process itself. If Judge Friendly, however, was suggesting that Rule 41 does not apply even to a concededly "joint" search, then the question is whether or not Byars v. United States, 273 U.S. 28 (1927) and Lustig v. United States, 338 U.S. 74 (1949) are still binding, an issue not raised by the Government in its Brief nor treated by the court below. Were this the issue, then the parties should probably have an opportunity to file supplemental briefs to discuss the matter more fully. Defendant, of course, contends that the Byars and Lustig cases remain good law and that Navarro was correctly decided.

II - THE DEFECTS IN THE CALIFORNIA PROCEDURE IN THIS CASE WERE OF CONSTITUTIONAL MAGNITUDE.

A. CONSTITUTIONALLY, THE PROCEDURE USED IN THIS CASE WAS DEFICIENT BECAUSE ONLY A DISINTERESTED MAGISTRATE WITHIN THE SPHERE OF THE JUDICIAL SYSTEM CAN ISSUE OR SIGN THE SEARCH WARRANT.

The United States Supreme Court has recently reaffirmed the rule that a disinterested magistrate must pass upon probable cause and issue the search warrant. Shadwick v. City of Tampa, 407 U.S. 345, 348-350 (1972). The Supreme Court analyzed the Fourth Amendment requirement for a neutral and detached magistrate as follows:

"...The substance of the Constitution's warrant requirements does not turn on the labeling of the issuing party. The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, [333 U.S. 10, 14 (1948)]; Giordenello v. United States, [357 U.S. 480, 486 (1958)]. In Coolidge v. New Hampshire, [403 U.S. 443 (1971)], the Court last Term voided a search warrant issued by the state attorney general 'who was actively in charge of the investigation and later was to be chief prosecutor at the trial.' Id., at 450. If, on the other hand, detachment and capacity do conjoin, the magistrate has satisfied the Fourth Amendment's purpose." Supra at 350.

The factual situation at bar is closely analogous to that

found impermissible in Coolidge v. New Hampshire, 403 U.S. 443 (1971), where the state attorney general, who participated in the investigation and later became the chief prosecutor at trial, authorized the search warrant in his capacity as a state justice of the peace. Here customs agent Nadel participated closely in the investigation and subsequent search and he was called upon to sign the judge's name to the telephonic warrant.

The constitutional requirement outlined in Shadwick exists as much to guarantee that the warrant is in proper form and particularly describes the place to be searched and the persons or things seized as to guarantee determination of probable cause by a neutral and detached magistrate. Even if it be contended that a magistrate could perform the latter function (finding probable cause) on the basis of oral testimony given over the telephone, how can it be concluded that the magistrate may perform the former functions without having personally before him the application and the proposed warrant sought to be issued? Where the magistrate does not have before him the warrant and the application, it becomes critical that his agent who does meets the Shadwick tests of neutrality and capability.

The very police officers who applied for the warrant "simply cannot be asked to maintain the requisite neutrality with regard to their own investigations--the 'competitive enterprise' that must rightly engage their single-minded attention." Coolidge v.

New Hampshire, supra, 403 U.S. at 450, quoting the words of Mr. Justice Jackson in Johnson v. United States, 333 U.S. 10, 13-14 (1948). Nor, defendant contends, is the police officer--even a United States Customs Service special agent--invested by training and responsibility with the capability to determine if the warrant is completed in proper form. No disrespect to the intelligence of United States Customs agents is intended. What disqualifies is the combination of lack of neutrality with Nadel's position "entirely outside the sphere of the judicial branch." Shadwick v. City of Tampa, supra, 407 U.S. at 352. Indeed, Nadel was entirely outside of the direct supervisory control and authority not only of the California judicial branch but also of the California law enforcement system as well.

The United States Supreme Court in Shadwick expressly reserved decision on the question of "whether a state may lodge warrant authority in someone entirely outside the sphere of the judicial branch." Supra at 352. On the record in Shadwick, the municipal court clerk was "an employee of the judicial branch of the City of Tampa, disassociated from the role of law enforcement. On the record in this case, the independent status of the clerk cannot be questioned." Id. Turner, therefore, presents the question reserved in Shadwick with the added element that the person who participated in the issuance of the

warrant was not only outside the sphere of the judicial branch, but also engaged in the role of law enforcement.

Each step of the warrant-issuing-process from the presentation of sworn evidence to the judge through the time when the formal written document was completed, signed and delivered for execution necessarily called for the exercise of impartial review and judgment. Yet at a critical stage of this process--the review for form¹³ and the actual signing--a federal law enforcement officer outside the sphere of the California judicial system, not a disinterested magistrate, so closely participated as to render the entire proceedings fatally defective in a constitutional sense.

B. A TELEPHONIC OATH IS IMPERMISSIBLE UNDER THE FOURTH AMENDMENT.

The Fourth Amendment forbids the issuance of warrants except where "supported by oath or affirmation." It has been consistently held, in both civil and criminal contexts, that an oath must be personally taken and personally administered. The

¹³ Of course, it is not constitutionally required that the warrant be typed in the magistrate's presence and Turner does not so contend. United States v. McKenzie, 446 F.2d 949, 953 (6th Cir. 1971).

"affiant must perform some corporal act before the officer whereby he consciously takes upon himself the obligations of an oath." 2A C.J.S. Affidavits §30 (1972) at 463; Bookman v. City of New York, 200 N.Y. 53, 56, 93 N.E. 190, 191 (1910); People v. Semonite, 189 N.Y.S. 2d 256, 257-258 (County Ct. 1959). The overwhelming weight of authority has declared telephonic oaths invalid.

"Oaths cannot be taken or administered over the telephone. It has been held that such a method of administering oaths is entirely unauthorized and illegal. Thus, it has been remarked that 'in order to make an affidavit, there must be present the officer, the affiant, and the paper, and there must be something done which amounts to the administration of an oath. There must be some solemnity, not mere telephone talk. Long distance swearing is not permissible. Telephonic affidavits are unknown to the law.' The law requires the affiant to be in the personal presence of the officer administering the oath, not to the end that the officer may know him to be the person he represents himself to be, for it is not required that the affiant be identified, introduced, or personally known to the officer, but to the end that he be certainly identified as the person who actually took the oath." 58 Am. Jur. Oaths §12, pp. 850-851 and cases cited at notes 12, 13 and 14.

See also Wise v. Cain, 212 S.W. 2d 880, 882 (Tex. Civ. App. 1948); 12 A.L.R. 538; 58 A.L.R. 604 and cases cited. Note also that the Model Code of Pre-Arrest Procedure §172 does not authorize use of oral affidavits outside of the physical presence of the magistrate.

As a matter of constitutional imperative, therefore, the

oath or affirmation required by the Fourth Amendment must be personally administered, the person giving the oath being in the presence of the magistrate taking it. Dow v. Baird, 389 F.2d 882, 884 (10th Cir. 1968); cf., Gramaglia v. Gray, 395 F. Supp. 606, 610 (S.D.Ohio 1975).

In suggesting in its Brief (p. 17) that Turner's position approaches the level of mysticism, the Government misses the thrust of this constitutional argument. The defendant does not contend that "oaths dissolve on contact with telephones."

(Brief, p. 17) The practice of the common law at the time of the adoption of the Fourth Amendment required an oath or affirmation to be made to the issuing magistrate. The essential thrust of the requirement, however, was the imposition of the oath itself to guarantee the truth of the factual claims made to the magistrate in support of the requested search. There was then and is now no constitutional reason to require the magistrate himself to take the oath, or even to require the oath actually to be taken in the presence of the magistrate.¹⁴ What is required constitutionally is only that the affiant be properly sworn which, defendant contends, must mean, as it meant in the 18th century, that the giver and the taker of the oath both be present, each with the other, at the time of the act. Thus, in this

¹⁴The contrary is required by Rule 41(c). See Part I.B. of this Brief.

case, the constitutional hurdle could have been overcome if a proper authority in the presence of Nadel and Miss Dalton had put each under oath, although this would not, of course, have satisfied the clear language of Rule 41(c).

In the warrant situation, apart from several California Court of Appeals cases supporting the California telephonic search warrant statute¹⁵ and dictum in one Arizona case involving Arizona's similar statute,¹⁶ oaths over the telephone or oaths administered other than when the affiant is in the presence of the person administering the oath are overwhelmingly rejected in this country. Compare cases which have allowed sworn oral testimony in support of a search warrant, none having permitted such testimony unless given in the physical presence of the magistrate. E.g. United States v. Berkus, 428 F.2d 1148 (8th Cir. 1970); Boyer v. Arizona, 455 F.2d 804 (9th Cir. 1972); Huff v. Commonwealth, 194 S.E. 2d 690, 692 (Va. 1973); Commonwealth v. Millikan, 300 A.2d 78, 81 (Pa. 1973) (see dissents,

¹⁵ E.g. , People v. Peck, 113 Cal. Rptr. 806, 810 (Ct. App. 1974); People v. Aguirre, 103 Cal. Rptr. 153, 155 (App. Ct. 1972). But cf., Fixler v. Superior Court, 113 Cal. Rptr. 285, 289-290 (Ct. App. 1974)

¹⁶ State v. Boniface, 26 Ariz. App. 118, 546 P.2d 843, 846 (1976)

82-87); Miller v. Sigler, 353 F.2d 424, 426 (8th Cir. 1965);
State v. Doe, 227 Iowa 1215, 290 N.W. 518, 522 (1940); Burtch v.
Zeuch, 200 Iowa 49, 202 N.W. 542, 544, 39 A.L.R. 1349 (1925).
In contrast, two cases cited in the Government's Brief (p. 17),
McKnight v. State Land Board, 14 Utah 2d 238, 381 P.2d 726, 733-
734 (1963), and Kuhn v. St. Joseph, 234 S.W. 353 (Ct. App. 1921),
did not involve constitutionally-mandated oaths, each case only
holding that certain statutes regulating the filing of forms in
administrative proceedings had been complied with: an applica-
tion for an oil and gas lease in McKnight and notice prior to
suit for personal injuries as a result of a sidewalk fall down
in Kuhn.

III. THE DISTRICT COURT CORRECTLY DECIDED THAT CALIFORNIA LAW WAS VIOLATED BY THE SEARCH IN THIS CASE

Judge Johns, purporting to act in accordance with provisions of California Penal Code §§1526(b) and 1528(b), authorized the United States Customs agent to sign his name on the duplicate original warrant.

California Penal Code §1526(b) provides:

"In lieu of the written affidavit required in Subdivision (a), the magistrate may taken an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court."

Although on its face this section does not necessarily authorize oral statements except those made under oath in the presence of the magistrate, several California courts have stated that the magistrate may make the determination of probable cause on the basis of oral statements transmitted by telephone. People v. Peck, 38 Cal. App. 3d 993, 113 Cal. Rptr. 806, 810 (Cal. App. 1974); Bowyer v. Superior Court, 37 Cal. App. 3d 151, 111 Cal. Rptr. 628, 635, rehearing 112 Cal. Rptr. 266 (1974); People v. Aguirre, 26 Cal. App. 3d 7, 103 Cal. Rptr. 153, 155 (1972), (Super. Ct. App. Div. 1972)

Penal Code §1528(b) provides in pertinent part:

"The magistrate may orally authorize a peace officer to sign the magistrate's name on a duplicate original warrant. A duplicate warrant shall be deemed to be a search warrant for the purposes of this chapter and it shall be returned to the magistrate as provided for in Section 1537..."

The Government concedes on Appeal, as it must, that the California Statute was violated because Seth Nadel, U.S. Customs Agent, was not a "peace officer" within the terms of the California statute.¹⁷ The error is clear. The California Penal Code carefully delimits what persons are "peace officers" and federal customs agents are not included.

Penal Code §7(8) provides that "the words 'peace officer' signify any one of the officers mentioned in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 . . ." of that code. §830 in turn, states in pertinent part:

"Any person who comes within the provisions of this Chapter and who otherwise meets all the standards imposed by law on a peace officer is a peace officer,

¹⁷ Before the District Court, the Government contended that the language of §1528(b) was permissive not mandatory and that the magistrate could authorize someone else to sign or, in the alternative, that the signing was a mere ministerial act and the search warrant was ratified by the magistrate's later subscribing his own signature (after the search).

and notwithstanding any other provision of law no person other than those designated in this Chapter is a peace officer..."

Penal Code Chapter 4.5 contains twenty-three sections spelling out what persons are "peace officers", from municipal policemen and county sheriffs to commissioners and rapid transit district security officers. Judge Zampano read the law correctly:

"...although special agent Nadel's duties as a federal officer closely parallel those of a California peace officer, Nadel is not a peace officer under California law. California Penal Code §830, et seq.; People v. Lacey, 105 Cal. Rptr. 72, 76 (Cal. App. 1973); People v. Yet Ming Yee, 145 C.A. 2d 513, 382 P.2d 616 (1956); In re Neagle, 39 Fed. 883 (Cir. Ct. N.D. Cal.) affd. 135 U.S. 1 (1890)." Opinion 3 (App. 34A)

The District Court properly pointed out that the provisions of §1528(b) requiring the signature of a peace officer were mandatory not permissive (Opinion 3-4, App. 34A-35A) and that the signing was not a mere ministerial act but rather an indication "that the warrant is in proper form and sufficient probable cause has been demonstrated by its issuance. The signature attests to the legal sufficiency of the warrant; and hence, it is clearly more than a 'mere ministerial act.'" (Opinion 5, App. 35A-36A)

The California telephonic procedures were first enacted in 1970 by the addition of the two (b) sub-sections to §1526 and

§1528. Read together these sections support the conclusion that Judge Zampano drew--the procedural requirement of signing by a peace officer was mandatory and must be strictly observed.

In fact, the importance of the state restriction to peace officers is of crucial significance in view of the overall statutory scheme that has long prevailed in California regulating search and arrest warrants. California has, apparently since at least 1872, set forth by statute the grounds upon which arrests can be made and search warrants issued. Arrests can be made without warrant not only by peace officers (Penal Code §836) but also by private citizens (Penal Code §§837, 847) under conditions specified in the statutes. The grounds are broadest for peace officers acting as such within their jurisdictions, embracing arrests both for felonies and for misdemeanors. A private citizen, however, can only make an arrest in three situations: for a public offense committed or attempted in his presence, or when the person arrested has committed a felony although not in his presence, or when a felony has been in fact committed and he has reasonable cause for believing the person arrested committed it. (Penal Code §837) In addition, California law permits peace officers to make arrests outside of their jurisdictions. However, when acting outside of

his jurisdiction, a peace officer stands the same as if he were a private citizen: "An officer's power of arrest, when acting beyond the limits of the geographical unit by which he is appointed, becomes that which is conferred upon a private citizen in the same circumstances." People v. Martin, 225 Cal. App. 2d 91, 36 Cal. Rptr. 924, 926 (1964). The courts have also upheld warrantless arrests made by federal law enforcement officers for state criminal violations but only where the arrest could have been made by a private citizen in the same situation. E.g., Neggo v. United States, 390 F.2d 609 (9th Cir. 1968); People v. Lacey, supra.

The statutory liberality with which warrantless arrests are treated sharply contrasts with the restrictive limits placed upon warrants. Both arrest and search warrants can only be directed to and executed by California peace officers. Penal Code §§816, 1523; cf., Ward v. United States, 316 F.2d 113, 117 (9th Cir. 1963). Private citizens, including federal law enforcement officers, cannot carry out search warrants except in assistance of a California peace officer. And a warrant does not authorize a peace officer to execute a search of premises outside of his jurisdiction.

17 Cal. Jur. 3d, "Criminal Law," §340 (1975 ed.); see People v. Grant, 1 Cal. App. 3d 563, 81 Cal. Rptr. 812, 815-816 (1970)

Thus, California has evidenced a strong state interest in promoting warrantless arrests for public offenses and felonies, encouraging private citizens and law enforcement personnel outside their own jurisdictions to apprehend suspected law breakers. At the same time, in recognition of the drastic governmental intrusion resulting from searches, the state has strictly limited use of warrants to proper peace officers and then only within their jurisdictions. Quite sensibly, California has adopted, as part of the statutory scheme, minimum standards of training and competence for all peace officers: "It is the intent of the legislature. . . that the minimum standards described in . . . this Act shall be designed to raise the level of competence of peace officers where necessary. . ." Penal Code §832; Stats. 1971, c. 1504, p. 2975, §2; 55 Op. Atty. Gen. 373, 10/4/72.

The Government puts heavy reliance upon the California District Court of Appeal decision in Sternberg v. Superior Court, 41 Cal. App. 3d 281, 115 Cal. Rptr. 893 (1974). The case, however, is not on point. Penal Code §§1526(b) and 1528(b) were not at

issue. Supra, 115 Cal. Rptr. at 896 n.2. In Sternberg, two police officers and the deputy district attorney went to the home of the magistrate, submitted a written affidavit, and one policeman signed and swore to it in the presence of the magistrate. The proposed warrant was in writing and reviewed by the magistrate. Although the judge orally authorized the officers to proceed, he neglected to sign his name because he was surprised at learning that the object of the search was a barber shop he patronized. Supra at 895.

More nearly on point is Bowyer v. Superior Court, 37 Cal. App. 3d 151, 111 Cal. Rptr. 628 (1974), decided by another District Court of Appeal. This case construed the statutes at issue in Turner. The police gave a telephonic affidavit to the magistrate; the magistrate found probable cause and directed the affiant to fix his name to the search warrant. However, the police in their haste neglected to produce the written document until the day following the search. The court suppressed the fruits of the search "because the procedure followed was not expressly authorized by law and violated the apparent statutory requirements that a search warrant must be in one or another of the authorized written forms before a valid search can be

conducted." Supra, 111 Cal. Rptr. at 636.

Whether Sternberg remains good law is open to doubt in view of the recent California Supreme Court decision in People v. Brisendine, 119 Cal. Rptr. 315, 531 P.2d 1099, 1110-1115 (Sup. Ct. 1975). The high court held that California constitutional provisions which are substantially equivalent to those in the Fourth Amendment impose higher standards for searches and seizures on state authorities than are compelled by the Federal Constitution. In any event, the California Supreme Court has not yet ruled on Penal Code §§1526(b) and 1528(b), and under Elkins v. United States, 364 U.S. 206, 224 (1960), this court must make its own determination concerning the Turner search. (See Part I.A., supra).

Judge Zampano's analysis of the important function played by the peace officer was well founded. The requirement that the person acting under direction of the magistrate in the issuance of a telephonic warrant be a peace officer is obviously designed to insure that all the statutory and constitutional formalities attending the issuance of a search warrant are satisfied when a magistrate is not physically present. The peace officer must act under judicial supervision, taking on a quasi-judicial role,

presumably in order to avoid conflict with the Fourth Amendment and to satisfy the Shadwick test. Permitting a federal officer, or a private citizen, to act as the judge's agent would remove the requirement of accountability and supervision built into the statutory scheme. So viewed, the breach here was no mere ministerial irregularity, but rather a matter going to the very heart of the warrant issuing process under the California statutory scheme and, particularly in the light of Shadwick, a defect of constitutional magnitude.¹⁸

¹⁸ This Court need neither reach the question of the constitutionality as such of the telephonic warrant statute or decide whether the magistrate can delegate to a proper peace officer the review and signing of the warrant, consistent with the Fourth Amendment in the light of Shadwick. It is enough in this case that the involvement of the federal law enforcement officer tainted the entire process and vitiated the statutory safeguards for supervision, accountability and capability built into the statute by the California legislature. See Part II.A. of this Brief, pp. 34-37. Compare also the per se rule of disqualification enunciated in Coolidge v. New Hampshire, *supra*, 403 U.S. at 450.

IV. THE SUPPRESSION REMEDY APPLIED BY THE DISTRICT COURT WAS PROPER UNDER THE CIRCUMSTANCES.

Turning to the question of whether the defects found justify the suppression remedy applied by the District Court: Should this court accept defendant's contention that the defects were of constitutional magnitude, then there would be no doubt that suppression was the proper remedy. The District Court order, although entered on other grounds, would be correct and should be affirmed. That is, the suppression order was correct if this court agrees with Turner's argument in Part II.A. that the participation of the federal law enforcement agent in the warrant issuance process tainted the entire proceedings because he was neither neutral and detached, nor constitutionally capable of the necessary review, signing and delivery of the warrant, nor within the sphere of the California judicial branch. The standards of the Fourth Amendment as enounced in Coolidge v. New Hampshire, supra, and Shadwick v. City of Tampa, supra, were violated. The evidence must be suppressed.

By the same token, if this court agrees with Turner's position in Part II.B. that the oath or affirmation required by the Fourth Amendment is an oath personally taken and personally admin-

istered, the taker and giver both being present each with the other, then the process here fell short of the constitutional standard. The evidence seized as a result of the warrant, therefore, was properly suppressed.

The more difficult question arises if the court does not reach a constitutional adjudication.¹⁹ Under the formulation in United States v. Burke, supra, 517 F.2d. at 386-387, the "violation of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." Supra at 386. Since the motion below was, by stipulation of the parties, heard only on the record and then only with regard to three limited issues, the parties did not introduce evidence or "prejudice" or of "intentional and deliberate disregard" of Rule 41. Nor did the court

¹⁹The Government has raised the Burke case for the first time on appeal.

consider these matters.²⁰ However, Turner contends that the violations of Rule 41 were of constitutional magnitude or, in the alternative, of the same character as in Navarro v. United States, supra, such that "the defect made what was done in effect a warrantless search." United States v. Burke, supra, 517 F.2d at 386.

The defects in Burke resulted from the request to the Connecticut State judge for the federal warrant using preprinted Connecticut search warrant forms. ". . . [T]he use of the state rather than a federal form of warrant seems to have been the result not of a deliberate intent to flout Rule 41 but of understandable confusion of what it required." Supra at 387. This court observed that there was no reason to doubt that the state judge would have been willing to issue a warrant calling for execution by a federal agent and the return to a federal magistrate within ten days had he been asked to do so. In contrast, the "sworn to before" requirement of Rule 41 is fundamental to the

²⁰ If this court agrees that there was non-compliance with Rule 41 not of constitutional magnitude but does not agree that Turner presents the Navarro situation or is uncertain as to the weight to be attributed to the violation, then remand for an appropriate determination by the District Court in the first instance would be a sound disposition of the appeal.

operation of the Rule and is of apiece with the constitutional requirements of the Fourth Amendment. It can never be satisfied under the California statutory procedure so long as the applicants do not "appear personally" before the magistrate. And, the requirement that it be "issued" by a disinterested magistrate --which means and includes "signed"--cannot be satisfied either, so long as the warrant is prepared, completed, reviewed, signed and delivered by a law enforcement officer not within the sphere of the California judicial branch. Until such time as the Congress permits amendments to Rule 41(c) to take effect authorizing the telephonic search warrant procedure, the Turner defects could never be remedied consistent with Rule 41 as the Burke defects could have been.

The Government makes passing mention of exigent circumstances. (Brief, p. 23) No claim was made below that exigent circumstances justified the procedure used in the Turner case. Indeed, no such claim would be availing here. The house was vacant (apparently under close and continuing surveillance) and the occupants were in custody. Although there was a suggestion made to the state judge that Turner was about to make bail, the facts are that by the time the search was completed in the early morning hours of

June 12, 1974, Turner had still not been released and no occupant of the premises had tried to return to the house.

It should also be noted that the irregularities in Turner all occurred during the very process of the application for the warrant rather than after the warrant had been issued. Compare the cases cited by the Government in its Brief (pp. 12-13 n.1) where the defects were only "minor irregularities". United States v. Romano, 203 F. Supp. 27 (D. Conn. 1962), revd. in part, affd. in part, 330 F.2d 566 (2d Cir. 1974), cert. den. 380 U.S. 942(1965); United States v. Averell, 296 F. Supp. 1004 (E.D. N.Y. 1969) (the defendant was present in the magistrate's office at the time the warrant was issued); see also Cody v. Dombrowski, 413 U.S. 433 (1973) (two items omitted from return); United States v. Dudek, 530 F.2d 684 (6th Cir. 1976) (failure promptly to file verified inventory); United States v. Harrington, 504 F.2d 130 (7th Cir. 1974) (copy of warrant and property receipt not given defendant who was present during search); United States v. Hall, 505 F.2d 961 (3d Cir. 1974) (original return not signed after the search but defendant received copy with accurate list); United States v. Longfellow, 406 F.2d 415 (4th Cir. 1969), cert. den. 394 U.S. 998 (grounds for search listed in wrong blank on

preprinted form); United States v. Christopher,

F.2d

Docket No. 76-1334 (2d Cir., Dec. 7, 1976) (clerical error in address).

It is submitted that the question of whether or not telephonic search warrants should be allowed in federal investigations or in joint federal-state undertakings (as in Turner) is a policy matter properly entrusted to the rule making power of the United States Congress, not to the courts of appeal. This difficult policy question is, in fact, now before the United States Congress, and the Congress has acted to delay implementation of a rule which would have permitted use of at least some procedure similar to that employed on June 11, 1974. The violations of Rule 41 were substantial. The conflicts between the procedures prescribed under the California statutes and the procedures actually used (including the participation of the federal law enforcement officer) as well as the irreconcilable conflicts with Rule 41 were unavoidable because created by the very structure and substance of the Rule as it now stands. Accordingly, this court should affirm the decision of the District Court. The Government's argument on pages 23-24 of its Brief in support of a telephonic search warrant procedure are more properly directed to the forum

capable of acting on them--the Senate and the House of Representatives of the United States.

CONCLUSION

For all of the foregoing reasons, the court below reached the right result in ordering suppression of the evidence in this case. The judgment below should be affirmed.

RESPECTFULLY SUBMITTED,
THE DEFENDANT, WILLIAM D. TURNER

By 

Robert G. Oliver
Daggett, Colby & Hooker
His Attorneys
205 Church Street
New Haven, Connecticut 06503

1/21/77

ADDENDUM

Statutes and Rules Involved

Rule 41(a), F.R.Crim.P.

Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

Rule 41(c), F.R.Crim.P.

Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

California Penal Code §1523

Search warrant defined. A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for per-

sonal property, and bring it before the magistrate.

California Penal Code §1524

A search warrant may be issued upon any of the following grounds:

1. When the property was stolen or embezzled.
2. When the property or things were used as the means of committing a felony.
3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.
4. When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be.

California Penal Code §1526

(a) The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing, and cause same to be subscribed by the party or parties making same.

(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be filed with the clerk of the court. In the alternative in such cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall be filed with the clerk of the court.

California Penal Code §1528

(a) If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property or things specified, and to retain such property or things in his custody subject to order of the court as provided by Section 1536.

(b) The magistrate may orally authorize a peace officer to sign the magistrate's name on a duplicate original warrant. A duplicate original warrant shall be deemed to be a search warrant for the purposes of this chapter, and it shall be returned to the magistrate as provided for in Section 1537. In such cases, the magistrate shall enter on the face of the original warrant the exact time of the issuance of the warrant and shall sign and file the original warrant and the duplicate original warrant with the clerk of the court as provided for in Section 1541.

California Health & Safety Code §1707.1

The sale, offering for sale, holding for sale, delivering, giving away, prescribing or administering of any drug, medicine, compound or device to be used in the diagnosis, treatment, alleviation or cure of cancer is unlawful and prohibited unless (1) an application with respect thereto has been approved under Section 505 of the Federal Food, Drug and Cosmetic Act, or (2) there has been approved an application filed with the board setting forth:

(a) Full reports of investigations which have been made to show whether or not such drug, medicine, compound or device is safe for such use, and whether such drug, medicine, compound or device is effective in such use;

(b) A full list of the articles used as components of such drug, medicine, compound or device;

(c) A full statement of the composition of such drug, medicine, compound or device;

(d) A full description of the methods used in, and

the facilities and controls used for, the manufacture, processing and packing of such drug, medicine or compound or in the case of a device, a full statement of its composition, properties and construction and the principle or principles of its operation;

(e) Such samples of such drug, medicine, compound, or device and of the articles used as components of the drug, medicine, compound or device as the board may require; and

(f) Specimens of the labeling and advertising proposed to be used for such drug, medicine, compound or device.

Constitution of the United States, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CERTIFICATE OF SERVICE

I hereby certify that on this ~~20th~~^{21st} day of January, 1977, I mailed ten copies of the foregoing Brief of Defendant-Appellee, postage prepaid, to Clerk, United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, New York, 10007.

And I hereby further certify that on this ~~20th~~^{21st} day of January, 1977, I served the foregoing Brief upon counsel of record by causing two copies to be mailed, postage prepaid, to Hon. Peter C. Dorsey, United States Attorney, District of Connecticut, and Harold James Pickerstein, Esq., Chief Assistant United States Attorney, P. O. Box 1824, New Haven, Connecticut, 06508.



ROBERT G. OLIVER